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OLD REPUBLIC TITLE COMPANY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARIA R. METCALF,
Plaintiff,

v.

DREXEL LENDING GROUP, a California
corporation, OLD REPUBLIC TITLE
COMPANY, a California corporation,
AURORA LOAN SERVICES LLC, a
California limited liability company,
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., a
Delaware corporation, and ROBERT E.
WEISS INCORPORATED, a California
corporation,

Defendants.

Case No. 08 CV 731 W POR

Assigned to: Hon. Thomas J. Welan

**NOTICE OF MOTION AND MOTION BY
DEFENDANT OLD REPUBLIC TITLE
COMPANY TO DISMISS THE
COMPLAINT FOR FAILURE TO STATE
A CLAIM UPON WHICH RELIEF CAN BE
GRANTED OR, IN THE ALTERNATIVE,
FOR A MORE DEFINITE STATEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: July 28, 2008

[FRCP 12(b)(6); and 12(e)]

**NO ORAL ARGUMENT PURSUANT TO
LOCAL RULE 7.1(d)(1)**

TO THE JUDGE OF THE DISTRICT COURT AND PRO SE PLAINTIFF MARIA R.
METCALF:

PLEASE TAKE NOTICE that on July 28, 2008 at 10:30 a.m., or as soon thereafter as the
matter may be heard, in Courtroom 7 of the United States District Court, for the Southern District

of California, located at 940 Front Street, San Diego, California, defendant OLD REPUBLIC TITLE COMPANY (hereinafter "ORTC"), will and does hereby move the Court for an order dismissing plaintiff's complaint pursuant to Federal Rule of Civil Procedure ("FRCP") 12b(6) on the grounds that the complaint fails to state facts sufficient to state a cause of action upon which relief can be granted as against ORTC because all causes of action in the complaint are premised on alleged violations of the Truth in Lending Act ("*TILA*"), 15 USC §§ 1601, et. seq., and the Real Estate Settlement Procedures Act ("*RESPA*"), 12 USC §§ 2601, et. seq., which are barred as a matter of law by expiration of the applicable statutes of limitation.

At the same date, time and place, in the alternative, ORTC will also move the Court for an order, pursuant to FRCP 12(e), for a more definite statement on the grounds that the complaint is so vague and ambiguous that ORTC cannot be reasonably required to frame a responsive pleading.

The motion herein is based on this notice of motion and motion, the memorandum of points and authorities set forth herein below, the court's entire file herein, and any further evidence and argument as may be presented at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
MOTION TO DISMISS AND ALTERNATIVE MOTION FOR
A MORE DEFINITE STATEMENT

1. **INTRODUCTION**

Plaintiff's complaint filed April 22, 2008 asserts multiple purported causes of action for alleged violations of *TILA*, and *RESPA*, arising in connection with her \$900,000 trust deed loan received from lender Drexel Lending Group ("Drexel") on February 1, 2007. Generally, *TILA* and *RESPA* require that certain disclosures be made to a credit applicant by the creditor at or prior to the consummation of a consumer credit transaction.

An action seeking damages under *TILA* and/or *RESPA* must be brought within one year from the date of the alleged violation. Plaintiff's extended right of rescission, if one actually exists, expires three years after consummation of the complained of transaction or upon sale of the subject property, whichever occurs first.

2. STATEMENT OF RELEVANT FACTS

On or about February 1, 2007 plaintiff received a \$900,000 trust deed loan from Drexel. Because the violations alleged in the complaint must have occurred, if at all, on or before the date Drexel made the loan to plaintiff, February 1, 2007 is the date of the complained of transaction in this instance. It is also the date on which the statutes of limitation began to run. Plaintiff's specific allegation of the February 1, 2007 date in paragraph 6 of the complaint further supports that date as the date from which the limitations periods must be measured.

The loan from Drexel to plaintiff is evidenced by a Deed of Trust. Plaintiff personally appeared before Notary Public Francis Henry S. Calabig on February 1, 2007, at which time she signed the Deed of Trust. The Deed of Trust was subsequently recorded in the official records of the San Diego County Recorder's Office on February 13, 2007 as document # 2007-0101097. It grants a security interest in plaintiff's residence located at 954 Surrey Drive, Chula Vista, California ("Subject Property") in favor of lender Drexel and its nominee, Mortgage Electronic Registration Systems, Inc. ("MERS"). A true and correct copy of the recorded Deed of Trust is attached to ORTC's request for judicial notice as RJN 1 filed concurrently with this motion to dismiss and is incorporated herein by this reference. The transaction was thus consummated on February 1, 2007 and the security interest perfected on February 13, 2007.

On February 22, 2008, with the plaintiff in default of her obligations under the loan contract and the Deed of Trust, a trustee's sale of the Subject Property (the security for plaintiff's \$900,000 loan from Drexel) was conducted and the property sold at public auction to Aurora Loan Services Group LLC ("Aurora"). True and correct copies of the recorded Notice of Default and Election to Sell Under Deed of Trust ("NOD"), Notice of Trustee's Sale ("NOTS") and Trustee's Deed Upon Sale ("Trustee's Deed") are attached as RJN 2, 3 and 4, respectively, to ORTC's request for judicial notice and are incorporated herein by this reference.

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1 3. FRCP 12(b)(6) MOTION TO DISMISS

2 A. A DEFENDANT MAY MOVE TO DISMISS WHERE PLAINTIFF'S
 3 COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF
 4 MAY BE GRANTED

5 Any defendant may raise the defense of failure to state a claim upon which relief can be
 6 granted by way of a FRCP 12(b)(6) motion to dismiss. A Rule 12(b)(6) dismissal is proper where
 7 there is either a lack of cognizable legal theory or the absence of sufficient facts alleged under a
 8 cognizable legal theory. *Sebastian International, Inc. v. Russolillo* 128 F. Supp. 630, 632
 9 (C.D.Cal.2001), citing *Balistreri v. Pacific Police Department* 901 F.2d 696, 699 (9th Cir. 1990).
 10 To avoid such a dismissal, the complaint must allege facts that establish all of the elements of the
 11 claims asserted. *Gooley v. Mobil Oil Corp.* 81 F.2d 513, 515 (1st Cir. 1988). Bald assertions,
 12 subjective characterizations and legal conclusions are insufficient. *DM Research Inc. v. College*
 13 *of American Pathologists* (1998) 2 F. Supp.2d 226-228, quoting *United States v. AVX Corp.* 962
 14 F.2d 108, 115 (1st Cir. 1992). Moreover, the factual allegations must be specific enough to
 15 justify "dragging a defendant past the pleading threshold." *Gooley*, supra, 851 F.2d at 515. The
 16 court is not required, however, to accept conclusory legal allegations "cast in the form of factual
 17 allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Sebastian*
 18 *International, Inc.*, supra, 128 F. Supp. at 633-634, citing *Clegg v. Cult Awareness Network*, 18
 19 F.3d 752, 754-55 (9th Cir.1994).

20 In ruling on a motion to dismiss, the Court can consider facts of which judicial notice may
 21 be taken. *MGIC Indem. Corp. v. Wiseman*, 803 F.2d 500, 504 (9th Cir. 1986). Leave to amend
 22 should not be afforded where the complaint cannot be amended to cure the defect. See, *Schreiber*
 23 *Distributing Co. v. Serv-Well Furniture Co., Inc.* 806 F.2d 1393, 1401 (9th Cir. 1986) and *Reddy*
 24 *v. Litton Industries, Inc.*, 912 F.2d 291, 296 (9th Cir. 1990). Where the facts set forth in the
 25 complaint demonstrate that the claims are barred by expiration of the statute of limitations, a
 26 motion to dismiss must be granted. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.
 27 1980).

1 B. PLAINTIFF'S DAMAGES CLAIMS UNDER *TILA* AND *RESPA* ARE
 2 BARRED BY EXPIRATION OF THE APPLICABLE STATUTES OF
 3 LIMITATION

4 The statute of limitations for damages claims under *TILA* is one year from the date of the
 5 occurrence of the violation. 15 USC §1640(e). Likewise, the statute of limitations for a damages
 6 claim under *RESPA* §§ 2607 and 2608 is one year. 12 USC § 2614. While § 2614 of *RESPA*
 7 does provide a three year statute of limitations for § 2605 violations relating to servicing of
 8 mortgage loans and administration of escrow accounts, it is inapplicable here because no such
 9 claims are set out in the complaint.

10 Here, the violation, if it occurred at all, must have occurred commensurate with the
 11 granting of plaintiff's \$900,000 loan on February 1, 2007. Thus, plaintiff's claims for damages
 12 under either *TILA* or *RESPA* expired on February 1, 2008. Since plaintiff did not file her
 13 complaint until April 22, 2008, a date well after the applicable statutes of limitation had expired,
 14 the damages claims are barred as a matter of law.

15 C. PLAINTIFF'S RESCISSION CLAIMS UNDER *TILA* AND ITS
 16 IMPLEMENTING REGULATION Z ARE ALSO BARRED

17 Plaintiff's rescission claims are premised on *TILA* (15 USC § 1635) and its implementing
 18 Regulation Z (12 CFR § 226.23). The statute of limitations for exercising the extended right of
 19 rescission under *TILA* is three years after the date of consummation of the transaction or upon
 20 sale of the property, whichever occurs first. 15 USC § 1635(f). While the transaction in this case
 21 was consummated on February 1, 2007, the Subject Property was sold to Aurora Loan Services
 22 LLC on February 22, 2008. Thus, plaintiff's right of rescission expired two months before she
 23 filed her complaint.

24 4. ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT

25 A motion pursuant to FRCP 12(e) for a more definite statement of the claims being
 26 presented against the defendant is appropriate when the complaint is so vague and ambiguous that
 27 the defendant cannot be reasonably required to frame a responsive pleading. FRCP 12(e);
 28 Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro. Before Trial (The Rutter

1 Group 2002) § 9:345, et seq.

2 In the instant case, the plaintiff's complaint fails to state any viable cause of action against
3 ORTC. Instead, the complaint merely asserts a series of rambling, speculative and conclusory
4 allegations, which do not provide the required factual basis to support an action against ORTC
5 for violation of either *TILA* or *RESPA*. The complaint fails to articulate any facts which would
6 support any such claim. Any claim for damages or rescission is barred by expiration of the
7 applicable statutes of limitation. Additionally, plaintiff's complaint is utterly defective in that it
8 fails to clearly and unambiguously allege that ORTC is a creditor. Civil liability under *TILA*
9 applies only to a creditor who fails to comply with the act's requirements. 15 USC § 1640(a).
10 Much more is needed here in order for the complaint to set forth clear and definite claims.

11 If this action is not dismissed outright, plaintiff must be required to present a much more
12 definite statement of the factual basis for her claims. Movant ORTC cannot be reasonably
13 expected to substantially respond to plaintiff's complaint without considerably more factual
14 detail, especially as it pertains to its alleged involvement. For example, ORTC is repeatedly
15 lumped together with other named defendants throughout the complaint, without the slightest
16 effort to distinguish the acts or involvement of each. Furthermore, at many points in the
17 complaint plaintiff makes reference to code sections as proscribing certain actions when in fact
18 the code sections have nothing to do with the alleged actions (e.g.; see Counts XIX, XX and
19 XXIII of plaintiff's complaint). The complaint is vague and/or ambiguous and, as such, it would
20 be unreasonable to require ORTC to frame a substantive responsive pleading.

21 If this honorable Court determines not to dismiss the complaint in this action, ORTC
22 respectfully requests that it issue an order directing the plaintiff to file a more definite statement
23 of her allegations.

24 5. CONCLUSION

25 Plaintiff's complaint fails to allege facts sufficient to support a cause of action as against
26 ORTC. The statute of limitations on plaintiff's damages claims expired February 1, 2008 and her
27 claims for rescission expired no later than the date of the trustee's sale of the Subject Property,
28 February 22, 2008. Because plaintiff waited to file her complaint until April 22, 2008, the claims

1 set forth therein barred by expiration of the applicable statutes of limitation as a matter of law.
2 Thus, the complaint should be dismissed. Further, since plaintiff cannot allege any set of facts to
3 support a claim for damages or rescission which is not barred, she should not be given leave to
4 amend. In the alternative, plaintiff should be ordered to file a more definite statement.

5 Dated: June 19, 2008

ARCHER NORRIS



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8 Steven L. Kester
Attorneys for Defendant
9 OLD REPUBLIC TITLE COMPANY
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